

October 19, 2016

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street NW
Washington, DC 20554

**Ex Parte: Protecting the Privacy of Customers of Broadband and Other
Telecommunications Services, WC Docket No. 16-106**

Dear Secretary Dortch:

The American Association of Advertising Agencies (“4A’s”), American Advertising Federation (“AAF”), Association of National Advertisers (“ANA”), Direct Marketing Association (“DMA”), Interactive Advertising Bureau (“IAB”), and Network Advertising Initiative (“NAI”) provide these comments to the Federal Communications Commission (“Commission” or “FCC”) on its proceeding related to the privacy of broadband customers.¹ We are the leading trade associations for advertising and marketing industries, collectively representing more than 5,000 U.S. corporations across the full spectrum of businesses that participate in and shape today’s media landscape.

We are concerned that the proposal in the Chairman’s fact sheet of October 6, 2016, would inappropriately classify all web browsing history and application use history as “sensitive information,” and unduly subject such information to an opt-in requirement.² This type of data has never categorically been classified as “sensitive” in any legislative, regulatory, or self-regulatory regime. We believe that to do so in the current rulemaking would undercut the competitive and innovative Internet marketplace, creating a negative impact on consumers and the diverse content and service offerings fostered by the responsible use of web browsing and application use history information for advertising and marketing purposes.

In our meeting with Chairman Wheeler’s office on October 14, 2016, we proposed that the appropriate approach for the treatment of this data would be to remove web browsing history and application use history information from the “sensitive information” category, and to separately define the appropriate consumer choice standard(s) for the use of such data.

Specifically, the FCC should require that Broadband Internet Access Services (“BIAS”) providers obtain a customer’s “opt-in” consent for the use or sharing of sensitive information, including web browsing history and application use history information that contains sensitive information, except for a limited set of other uses where consent is implied. All other uses of

¹ Filed pursuant to 47 C.F.R. § 1.1206.

² *Trade Association Letter to FCC* (Oct. 10, 2016)

<https://ecfsapi.fcc.gov/file/1010145590290/Trade%20Association%20Letter%20to%20FCC.pdf>.

web browsing history and application use history information should be subject to a customer's "opt-out" consent in response to a clear, meaningful, and prominent notice regarding such use or sharing, with the exception of a limited set of other uses for which consent is implied. A similar approach has been successfully implemented through the Digital Advertising Alliance's ("DAA") Self-Regulatory Principles and Guidelines, which provide effective transparency and choice to consumers, while preserving the ability to use non-sensitive web browsing history and application use history information in advertising and marketing. This approach has also been recognized in multiple data privacy regimes.

The FCC's proposed treatment of web browsing and application use history information would depart from Federal Trade Commission precedent and the DAA's established industry privacy guidelines. The DAA guidelines limit the use of sensitive information, including children's, health, and financial data. Other non-sensitive web browsing and application use data used for advertising and marketing purposes is covered by a flexible notice and choice framework. The DAA requires all entities that collect, use, and share all or substantially all web browsing history and/or application use history information for advertising purposes to obtain "Consent" from a consumer before engaging in that activity.³ This standard does not require an express, affirmative "opt-in," but instead the term Consent means an individual's action in response to a clear, meaningful, and prominent notice regarding the use of data for a specific purpose.⁴ To meet the "clear, meaningful, and prominent" requirement, the notice must be provided in a manner where the consumer will see it and have the opportunity to exercise choice via a mechanism that is easily accessible from this notice.

Based on our experience, and supported by the effectiveness and success of the DAA, we offer the following proposal regarding the use of web browsing history and application use history information:

I. Definitions:

- A. Web Browsing History:** Information about web viewing behaviors collected from a particular device over time and across non-affiliated websites. Web Browsing History does not include information that is de-identified.
- B. Application Use History:** Information about mobile application use collected from a particular mobile device overtime and across non-affiliated mobile applications. Application Use History does not include information that is de-identified.
- C. Sensitive Information:** Information that includes precise geo-location information, children's information, health information (e.g., pharmaceutical prescriptions or medical

³ DAA, *Self-Regulatory Principles for Online Behavioral Advertising*, 14 (2009) (hereinafter *OBA Guidance*) <http://www.aboutads.info/resource/download/seven-principles-07-01-09.pdf>; DAA, *Application of Self-Regulatory Principles to the Mobile Environment*, 19-20 (2013) (hereinafter *Mobile Guidance*) http://www.aboutads.info/DAA_Mobile_Guidance.pdf.

⁴ *OBA Guidance* at 10; *Mobile Guidance* at 4.

records), financial information (e.g., financial account numbers), Social Security numbers, or the Content of a Communication.

- D. Content of a Communication:** Information concerning the substance, purport, or meaning of a customer's communication carried on the BIAS provider's network, when such communication is not directed to or sent by the BIAS provider.
- E. Operations and Systems Management:** The use of information: for the provision of BIAS or services necessary to, or used in, the provision of such broadband service, or as necessary, or incident to routing or delivery of communications, services, and products initiated or requested by a BIAS customer via a BIAS transmission; to initiate, render, bill and collect for broadband Internet access service, and closely related services, e.g., tech support related to the broadband Internet access services, and to improve products and network performance, quality of service, and customer satisfaction; product development and market research; and to protect the rights, property, security, or safety of the BIAS provider or others, to share cybersecurity threat indicators as authorized by law, or to protect users of the broadband Internet access service and other BIAS providers from fraudulent, abusive, or unlawful use of the broadband Internet access service.

II. Requirements for BIAS Provider's Use or Sharing of Web Browsing History or Application Use History Information

- A. Use and Sharing of Web Browsing History and Application Use History Information that Contains Sensitive Information for Purposes Other Than Operations and Systems Management:** A BIAS provider shall obtain a customer's opt-in consent for the use and sharing of Web Browsing History and Application Use History information when such information contains Sensitive Information for purposes other than Operations and Systems Management.
- B. Use and Sharing of Non-Sensitive Web Browsing History and Application Use History Information for Purposes Other Than Operations and Systems Management:** A BIAS provider shall provide clear, meaningful, and prominent notice that permits the customer to take action to opt-out of the use and sharing of Web Browsing History and Application Use History information that does not contain Sensitive Information for purposes other than Operations and Systems Management.
- C. Use and Sharing of Web Browsing History and Application Use History Information for Operations and Systems Management:** Customer consent is implied for a BIAS provider's use and sharing of (including providing access to) Web Browsing History and Application Use History Information for Operations and Systems Management purposes.

We believe that the above proposal appropriately represents the sensitivity of web browsing and application use history information. It comports with long-standing industry practice, as well as consumer expectations with respect to the use of non-sensitive web browsing and application use history in the online ecosystem. The FCC's adoption of this approach would

strike the appropriate balance between privacy and economic benefits for both customers and BIAS providers.

* * *

We appreciate the opportunity to submit these comments, and we look forward to working with the FCC on this important issue.

Respectfully submitted,

American Association of Advertising Agencies
American Advertising Federation
Association of National Advertisers
Direct Marketing Association
Interactive Advertising Bureau
Network Advertising Initiative

Cc: Stu Ingis, Venable LLP
Mike Signorelli, LLP